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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEXANDER CLEMENTE OLMEDO,

Defendant and Appellant.

H045840

(Santa Clara County  
Super. Ct. No. C1650073)

Appellant Alexander Clemente Olmedo challenges two evidentiary rulings made by the trial court during his trial for crimes Olmedo allegedly committed against his former girlfriend. The jury found Olmedo not guilty of all charges except for one lesser included misdemeanor offense. For the reasons set forth below, we affirm the judgment.

**I. FACTS AND PROCEDURAL BACKGROUND**

Olmedo was charged by information with attempting to dissuade a victim or witness from reporting a crime (Pen. Code, § 136.1, subd. (b)(1); count 1); inflicting corporal injury on a specified person (Pen. Code, § 273.5, subd. (a); count 2); and false imprisonment (Pen. Code, §§ 236–237; count 3).

At Olmedo's trial, the jury heard from a number of witnesses. Michelle E.B.<sup>1</sup> had dated Olmedo for about three years; they stopped dating in February 2016. After February 2016, Michelle and Olmedo saw each other occasionally. Michelle and Olmedo had never lived together.

On November 4, 2016, the night before the incident, Olmedo spent the night with Michelle. Michelle was upset with Olmedo because he had arrived late. In the morning of November 5, 2016, around 8:30 a.m., Michelle woke Olmedo up and told him to leave so that she could go to the gym. Olmedo asked if he could come back that night, Michelle said no, and Olmedo got angry.

Michelle testified that Olmedo grabbed her, pulled her onto the bed, and sat on top of her. Olmedo squeezed Michelle's body with his knees to hold her down. Michelle could not breathe and tried to fight him off. Olmedo was screaming at her. Olmedo bit Michelle, pulled her hair, and licked her. Michelle begged Olmedo to let her go. Olmedo shoved his hand on Michelle's mouth and "busted [her] lip open." Olmedo put his hand on Michelle's mouth multiple times. Blood was "going everywhere." Michelle kept squirming to try and push Olmedo off of her.

Olmedo told Michelle, "I control you. You can't get away from me." She testified that he was saying "all kinds of crazy stuff." Olmedo bit Michelle on her arms and on the cheek.

Michelle flipped over on to her stomach, and they rolled off of the bed. Michelle was bruised on her side from the fall. On the floor, Michelle rolled into a ball, and Olmedo got on top of her. Olmedo pushed her again to the floor. Michelle was worried "[she] was going to get suffocated to death." Olmedo told Michelle that if she called the police, she would regret it, which she understood to mean Olmedo would come back and kill her.

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<sup>1</sup> To protect her privacy, we refer to Michelle first by her first name and the initials of her last name and then by her first name only. (Cal. Rules of Court, rule 8.90(b)(4).)

Olmedo let Michelle go. She ran out of the apartment, which was on the second floor of the complex, to the top of the staircase outside of her apartment. Olmedo ran after Michelle, grabbed her, and tried to pull her back into the apartment. Michelle fought Olmedo, and he “got [her] in a choke hold and was choking [her] and trying to drag [her] back in.” Michelle screamed “[c]all 911.”

Michelle saw her neighbor run up the stairs to her apartment. The neighbor screamed at Olmedo to let Michelle go. Olmedo let Michelle go. Her neighbor went to stand between Michelle and Olmedo “to protect [her].” Eventually Olmedo left around 11:00 a.m.

After Olmedo left, Michelle cried, cleaned up the blood, and then called her sister. When asked further about the blood, Michelle testified that she cleaned up the blood “on my bed, the blood on my shirt, my face, my mouth. I had to make sure there was nothing left in my room that my son could see because he was coming home that weekend.” She testified she “threw away anything I had on that had blood, threw away the sheets.” She called her sister about 15 or 20 minutes after Olmedo left.

Michelle wanted to go to the police, but she did not want to call the police and have them come to her house because her neighbor had previously complained to her landlord about noise from her apartment. Michelle was afraid that if the police came to her apartment she would be evicted. Michelle was a single mom and had “nowhere else to go.”

Michelle testified about a prior incident that had occurred in 2014.<sup>2</sup> Michelle and Olmedo got in a fight one evening. Michelle testified that Olmedo “didn’t like the way I was talking to him, said I was disrespectful, I was lying, and that everything I say is a lie and I have no respect for him as a man.” Olmedo threw her on the bed, sat on her, pulled her hair, pulled her arms back and screamed at her. Olmedo “grabbed me by my face,

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<sup>2</sup> Defense counsel objected to this testimony. The trial court overruled the objection.

similar again with the neck thing, and then got up and left.” Michelle testified that she did not report the incident because “I didn’t think that he would do that again. I didn’t report it because I was scared of being evicted.” Michelle did not tell anyone else about the 2014 incident except for her ex-husband.

Shortly after the incident in 2014, Michelle’s landlord contacted her and told her that a neighbor had complained about the incident and Michelle “would get evicted if there was another complaint.” Other than that incident, Michelle had not had any other issues with her landlord.

Michelle first testified in response to a question from defense counsel that on November 5, 2016, she believed that her landlord could not evict her for this incident if Michelle was the victim of a crime. Later in response to a question from the prosecutor on re-direct examination, Michelle denied that she believed that being a victim of a crime would prevent her from being evicted; the landlord just “doesn’t want any problems.” On further cross-examination by defense counsel, Michelle acknowledged that, during her prior testimony at the preliminary hearing, she had testified that she believed that if she was a victim of a crime that would prevent her landlord from evicting her. When asked by the prosecutor about her demeanor during portions of her testimony, Michelle acknowledged she was frustrated and angry during defense counsel’s cross-examination of her.

Santiago A.<sup>3</sup> testified that he lived in the apartment below Michelle. He had been Michelle’s downstairs neighbor for about five or six years but did not socialize with her. Around 8:30 or 10:00 on the morning of November 5, 2016, he heard arguing and “a bunch of just commotion.” The walls in the apartment complex were “really thin.” It was not the first time Santiago had heard “them” arguing. Santiago had called the

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<sup>3</sup> To protect his privacy, we refer to this witness first by his first name and last initial and then by his first name only. (Cal. Rules of Court, rule 8.90(b)(10).)

landlord several years earlier about screaming from Michelle's apartment. The landlord told Santiago that the landlord had called Michelle and told her "you need to calm down."

On November 5, 2016, Santiago heard Michelle screaming " '[l]et me go.' " Santiago heard Michelle say something about calling the police or "someone call the police"; Santiago was not sure what she said. Santiago ran outside and saw Olmedo holding Michelle in a "headlock," and it "looked like [Olmedo] was trying to bring [Michelle] inside or something." It looked like Michelle was trying to push Olmedo off. Michelle was crying and looked shocked, puzzled, and scared.

Santiago ran up to them, said " 'what's going on?' " Olmedo then let Michelle go. Michelle and Olmedo were swearing at each other. Santiago heard Olmedo tell Michelle that if she called the police, she would regret it.<sup>4</sup> Olmedo got his things from Michelle's apartment and left. Santiago did not notice any injuries on Michelle or on Olmedo. Santiago did not call the police.

Aimee E.<sup>5</sup> is Michelle's sister. On the day of the November 5, 2016 incident, Aimee called Michelle around 10:00 a.m. Michelle was "hysterically crying" on the phone. Aimee "jumped in the car" within ten minutes of the call and drove to Michelle's house. It took Aimee about seven or ten minutes to get to Michelle's house.

Aimee testified that she arrived at Michelle's apartment between 11:00 a.m. and 12:00 p.m. When Aimee arrived at Michelle's apartment, Michelle was crying and hysterical. Aimee "couldn't get a word out of [Michelle] that made sense for a while.

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<sup>4</sup> On cross-examination, Santiago could not remember whether he had previously told a defense investigator that he did not hear Olmedo telling Michelle that she would regret calling the police. A defense investigator testified that she interviewed Santiago in June 2017, and Santiago told her that he did not hear Olmedo tell Michelle that she would regret calling the police. Officer Wilson, who interviewed Santiago sometime after the November 2016 incident, testified that Santiago told him that he (Santiago) heard Olmedo telling Michelle that if she called the police she would regret it.

<sup>5</sup> To protect her privacy, we refer to this witness first by her first name and last initial and then by her first name only. (Cal. Rules of Court, rule 8.90(b)(10).)

She was agitated. She was just falling apart.” Aimee was with Michelle at Michelle’s apartment for about 20 to 30 minutes. Michelle “really did not calm down” in that time. Michelle changed her clothes while Aimee was there.

Aimee testified that, while they were in the apartment, Michelle told Aimee that Olmedo “had hit her, had come in and they argued and he had sat on her and he had his hands around her neck and it felt like he was strangling her.”<sup>6</sup> Michelle also told Aimee that Olmedo “was on top of [Michelle] on the floor in the bedroom and she couldn’t get out, she couldn’t get up, and at one point I guess she did somehow and he—she couldn’t get out of the apartment.” (*Sic.*) Aimee saw “a lot of red marks on [Michelle’s] arms and some around her neck.” Michelle’s lips looked swollen. Aimee did not see any blood on Michelle or on her clothing or anywhere else in the apartment.

Michelle’s apartment “looked like as if something just imploded in the room.” Michelle kept crying while Aimee was in the apartment. Aimee told Michelle that they needed to go to the police. They left for the police department “somewhere between 11:30 [a.m.] and 12:00 [p.m.].” Once at the police station, they had to wait for “about an hour-and-a-half or so” for Michelle to speak with an officer.

A police officer with the Santa Clara Police Department interviewed Michelle at the police station. After speaking with the officer, Michelle went to the hospital because she was “in a lot of pain.” Michelle testified that she sustained injuries from the current incident with Olmedo, including a “busted” lip that was bleeding, a sore forehead and ear, her nose was “rubbed raw,” bruising and bite marks on her left arm and shoulder, and pain to her back and neck. The pain from her injuries lasted about six weeks.

Officer Adam Wilson interviewed Michelle a few minutes after 1:22 p.m. on November 5, 2016. Michelle seemed nervous at first and then started to cry. Michelle

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<sup>6</sup> Defense counsel objected to this testimony. The trial court overruled the objection.

calmed down, had a “normal” demeanor and was able to speak clearly with the officer. Wilson spoke with Michelle for approximately one hour.

Wilson observed a “blood spot” on Michelle’s lip, and scratches on the side of her mouth and on her cheek, nose, and ear. Wilson saw “some redness” on Michelle’s neck, and a “small scratch” under her chin. Wilson did not observe any “finger impressions” on Michelle or bruises around her wrists. Michelle’s arms had scrapes on them. Michelle “had a couple of injuries that looked like they maybe bled but not very much.”

Officer Wilson took photographs of Michelle’s injuries. Several of the photographs that Wilson took were admitted into evidence. As far as Wilson could recall, Michelle did not tell him anything about blood getting onto her shirt or bedding during the incident. Wilson did not form the impression that “there was a lot of blood evidence in this case.” Based on Michelle’s injuries, Wilson was not thinking of or concerned about blood collection.

Michelle told Officer Wilson about the 2014 incident.<sup>7</sup> The prosecution played for the jury a recording of a portion of Wilson’s interview of Michelle in which Wilson summarized what Michelle had told him about the earlier incident.<sup>8</sup> On the recording, Wilson states, “The first [incident] was last May, or a couple of years ago in May, May 2014. An unreported incident where he got mad, kinda got on top of you, was moving you around, smashing, smashing your head and face. Trying to bite and lick you.”

Officer Wilson interviewed Olmedo the day after the incident. Wilson observed that Olmedo had “several scratches on a couple different places on his body.” Wilson believed that Olmedo had “two scratches to his right forearm and a scratch to his right

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<sup>7</sup> Defense counsel objected to Wilson’s testimony about Michelle’s statements about the 2014 incident. The trial court overruled the objection.

<sup>8</sup> The recording was admitted into evidence over the defense’s objection.

chest and a scratch to the center of his chest.” Wilson took photographs of these injuries, some of which were admitted into evidence.<sup>9</sup>

The prosecution’s theory at trial was that Olmedo was angry at Michelle on November 5, 2016, because he did not have control over the direction of their relationship. The prosecution emphasized that Michelle’s account of the incident was corroborated by Santiago’s testimony about her demeanor and the headlock that he observed, the photos of Michelle’s injuries, and her medical records.

The defense’s theory at trial was that Michelle’s statements were geared toward making her seem like a victim of a crime rather than a participant in a heated argument so that her landlord would not evict her.<sup>10</sup> Defense counsel noted discrepancies in Michelle’s account in contrast with that of the other witnesses. For example, Michelle testified that she had blood on her shirt and injuries to her face, whereas Santiago did not observe any injuries or blood. Defense counsel also argued that the photographs of Michelle’s injuries taken by Wilson did not match Michelle’s description of her injuries. Defense counsel also pointed out that Michelle’s account of the 2014 incident was “completely uncorroborated,” closely paralleled the facts of the 2016 incident, and was first disclosed only in 2016 in her interview with Officer Wilson.

The jury found Olmedo not guilty of count 1, attempting to dissuade a victim or witness from reporting a crime. The jury also found Olmedo not guilty of count 2, inflicting corporal injury on a specified person, but the jury convicted him of the lesser included offense to count 2, misdemeanor battery against a person with whom he has or previously had a dating relationship, Penal Code section 243, subdivision (e)(1). The

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<sup>9</sup> The prosecution also introduced into evidence Michelle’s medical records from the incident.

<sup>10</sup> Although Olmedo requested that the trial court instruct the jury on self-defense, the trial court ruled that there was not substantial evidence that Olmedo acted in self-defense. Olmedo does not challenge that ruling on appeal.



jury also found Olmedo not guilty of count 3, false imprisonment, and not guilty of the lesser included offenses to count 3.

At sentencing, the trial court suspended imposition of sentence, placed Olmedo on formal probation for a period of three years, and imposed a variety of conditions of probation, including that he serve 60 days in the county jail.

## **II. DISCUSSION**

On appeal, Olmedo challenges two evidentiary rulings of the trial court. Specifically, Olmedo contends that the trial court erred in allowing admission as a spontaneous statement Aimee’s testimony about what Michelle told her had occurred earlier in the fight with Olmedo. (Evid. Code, § 1240.)<sup>11</sup> Olmedo also argues that the trial court erred in allowing Michelle to testify about the uncharged and previously unreported 2014 incident. For reasons that we will explain, we reject Olmedo’s claims of error.

### *A. Admission of Evidence Under Section 1240*

In a pretrial motion in limine, the prosecution sought admission as a spontaneous statement Michelle’s statement to Aimee about the November 2016 incident. The defense argued that the statement was inadmissible under section 1240 because of the lapse of time between Olmedo’s alleged assault and the statement and because Michelle had calmed down before she made the statement.

The trial court ruled that the hour between the argument and Michelle’s statement to Aimee “doesn’t present a problem” in light of relevant case law. The trial court stated, “[t]he question then becomes, it seems to the Court, whether this alleged traumatic event was still—still was affecting the complaining witness in this case. The hysteria described by Aimee in the—in the phone call bears all of the telltale marks of an individual who was still operating under the influence of the event that triggered the statements, so I am

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<sup>11</sup> Unspecified statutory references are to the Evidence Code.

going to grant the People’s motion to allow Aimee to testify she was told by her sister the defendant strangled her, sat on her, would not let her go pursuant to 1240 over the defendant’s objection.” During Aimee’s trial testimony, the trial court allowed her to testify about Michelle’s statements to her about the November 2016 incident.

On appeal, Olmedo renews his objection to the admission of Michelle’s statement to Aimee. Olmedo argues that Michelle’s statement was not made under the immediate influence of a startling event or without the opportunity for deliberation or reflection and is thus inadmissible under section 1240. Olmedo contends that Michelle had the opportunity for reflection, as shown by her decisions to clean her apartment, change her clothes, and not call the police.

We review the trial court’s admission of the statement under section 1240 for abuse of discretion. (*People v. Sanchez* (2019) 7 Cal.5th 14 (*Sanchez*).) “Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception. (Evid. Code, § 1240.) For a statement to fall within this exception, it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it. [Citations.] When the statements in question were made and whether they were delivered directly or in response to a question are important factors to be considered on the issue of spontaneity. [Citations.] But . . . [n]either lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in

abeyance.” (*People v. Penunuri* (2018) 5 Cal.5th 126, 152 (*Penunuri*), internal quotation marks and italics omitted.)

Olmedo does not dispute that the first and third requirements of section 1240 are met here. The violent fight between Michelle and Olmedo was startling, and Michelle’s account of that fight to Aimee related to the incident. Instead, Olmedo argues the trial court abused its discretion when it found that Michelle’s statement was made before she had had time to contrive and misrepresent. “Because the second admissibility requirement, i.e., that the statement was made before there was time to contrive and misrepresent, relates to the peculiar facts of the individual case more than the first or third does [citations], the discretion of the trial court is at its broadest when it determines whether this requirement is met.” (*Sanchez, supra*, 7 Cal.5th at pp. 39–40, internal quotation marks omitted.)

A court may consider a number of factors when making this determination. “Such factors include the passage of time between the startling event and the statement, whether the declarant blurted out the statement or made it in response to questioning, the declarant’s emotional state and physical condition at the time of making the statement, and whether the content of the statement suggested an opportunity for reflection and fabrication. [Citations.] This court has observed, however, that these factors may be important, but solely as an indicator of the mental state of the declarant. [Citation.] For this reason, no one factor or combination of factors is dispositive.” (*Sanchez, supra*, 7 Cal.5th at p. 40, internal quotation marks omitted.)

We conclude that the trial court did not abuse its discretion in finding that Michelle did not have time to contrive and misrepresent before making her statement to Aimee. Michelle testified that she called Aimee about 15 or 20 minutes after Olmedo

left.<sup>12</sup> Aimee testified that Michelle was “hysterically crying” on the phone call. Aimee estimated that about 20 minutes elapsed between the time she spoke with Michelle on the phone and the time she got to Michelle’s house. Although the timeline is not entirely clear, it appears that approximately one hour elapsed between the fight and Aimee’s arrival. When Aimee arrived at Michelle’s apartment, Michelle was “crying” and “hysterical,” “falling apart,” and she “really did not calm down” the whole time Aimee was there.

“In [*People v. Brown* (2003) 31 Cal.4th 518], [the California Supreme Court] concluded that the trial court did not abuse its discretion in finding a statement made two and a half hours after a shooting to be a spontaneous utterance, where the declarant was still visibly shaking and crying after having watched the shooting.” (*Penunuri, supra*, 5 Cal.5th at p. 152.) Therefore, the one-hour lapse here between the event and the statement does not preclude its admission.

Olmedo argues that the trial court’s decision was error under *People v. Ramirez* (2006) 143 Cal.App.4th 1512 (*Ramirez*). In *Ramirez*, the Court of Appeal held the content of the victim’s statement in that case showed that she had “actually engaged in a deliberative or reflective process as to the subject matter of the statements at issue,” rendering the statement inadmissible under section 1240. (*Ramirez, supra*, at p. 1526.) Olmedo contends that Michelle’s testimony that she did not want to get evicted and therefore did not call the police and that she cleaned her apartment because her son was coming home demonstrates the “deliberative or reflective process” the court found dispositive in *Ramirez*. We do not agree that the facts in *Ramirez* are sufficiently similar to those here to warrant a finding that the trial court abused its discretion in admitting Michelle’s statement to Aimee.

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<sup>12</sup> We note that Aimee testified that she was the one to call Michelle, and that the call was around 10:00 a.m. or 10:30 a.m. The minor differences between Aimee’s and Michelle’s accounts are immaterial to the admissibility of Michelle’s statement to Aimee.

In *Ramirez*, the incident at issue had occurred the prior evening, the victim had showered and slept in the interim, and had failed to disclose the rape in response to multiple prior questions whether she was “okay” before eventually making the statement. (*Ramirez*, *supra*, 143 Cal.App.4th at p. 1525.) Here, by contrast, Michelle was agitated, “falling apart,” and not making sense when Aimee arrived. Michelle did not calm down while Aimee was in the apartment with her, and there was no evidence that Michelle initially denied the incident with Olmedo had occurred. Furthermore, Aimee testified that it was her idea—not Michelle’s—that they go to the police station. That Michelle was reluctant to go to the police does not mean that the only permissible factual inference is that Michelle therefore had the opportunity to reflect and lie about what had occurred.

Although Olmedo argues that Michelle’s cleaning her shirt and apartment shows that she had time to calm down before Aimee’s arrival, the record does not support that inference. When Aimee arrived, the apartment looked like “something just imploded.” According to Aimee’s testimony, Michelle changed her clothes when Aimee was at the apartment. Throwing bloodstained clothing away does not equate to a deliberative and reflective process such that a person would engage in the fabrication of a story. Michelle was crying hysterically on the phone call with Aimee and was still crying when Aimee arrived. There is substantial evidence in the record supporting the trial court’s factual conclusion that Michelle was in a continuous state of agitation between the assault and her statement to Aimee.

In sum, the trial court did not abuse its discretion in concluding that Michelle made the statement to Aimee while still under the stress of the incident and before her reflective powers had been engaged and in therefore finding Michelle’s statement a spontaneous utterance admissible under section 1240.

#### *B. Admission of Prior Act of Domestic Violence Under Section 1109*

In a pretrial motion in limine, the prosecution sought admission of the 2014 incident between Olmedo and Michelle. Defense counsel argued that the trial court

should exclude the testimony about the prior incident pursuant to section 352.<sup>13</sup> Defense counsel contended that the trial court should not admit the evidence because Michelle had disclosed this prior act only in the course of telling the police about the instant offense, the prior event was over two years earlier, there was no corroboration of the earlier event other than Michelle's statement that it occurred, and the facts of the prior incident closely mirrored those of the current offense. The prior incident was "kind of a less serious version of what's happening here."

The trial court acknowledged defense counsel's argument and said, "the Court is hesitating on making a call on this." "I'm wondering if because of the similarity some kind of sanitizing might be a middle ground, because I'm inclined . . . to let it in in some form or another." The prosecutor argued that any cross-examination of the victim would be sufficient to sanitize the prior incident in the way sought by the trial court.

With respect to its analysis under section 352, the trial court stated the incident was less egregious than the conduct charged in this case, it was not going to be inflammatory because it was less serious than the instant allegations, and it would not be unduly time consuming. Turning to whether it was unduly prejudicial, the court highlighted that, because the prior conduct was less serious, it would not inflame the jury or cause the jury to "cast away their rational objective consideration of the evidence and then immediately conclude because of the evidence that's introduced with respect to the prior that the defendant is guilty." The court said the probative value is "pointed out in 1109," and "the probative value outweighs the prejudicial effect." The trial court stated "the Court is going to allow it to come in, for lack of a better phrase, un-sanitized. And then we'll see."

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<sup>13</sup> "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.)

On appeal, Olmedo does not contest the trial court's determination that evidence of the 2014 incident was admissible under section 1109, subdivision (a)(1).<sup>14</sup> However, Olmedo contends that section 1109 conditions admissibility of such evidence upon section 352, and here the evidence failed the section 352 balancing test because the evidence was highly prejudicial and of little probative value. In particular, Olmedo argues, the evidence was prejudicial because it included Olmedo's comments about a man's role in the relationship and "incited animosity toward Olmedo" such that the jury would want to make sure that Olmedo was punished.

"Ordinarily, evidence of prior criminal acts is inadmissible to show a defendant's disposition to commit such acts. (§ 1101, subd. (a).) An exception to this rule exists for cases involving domestic violence. (§ 1109, subd. (a)(1).) In enacting section 1109, the Legislature considered the difficulties of proof unique to the prosecution of [domestic violence cases] when compared with other crimes where propensity evidence may be probative but has been historically prohibited." (*People v. Megown* (2018) 28 Cal.App.5th 157, 163–164 (*Megown*), internal quotation marks omitted.)

Evidence admitted pursuant to section 1109 is "subject to exclusion under section 352 if the probative value of the evidence is outweighed by a danger of undue prejudice. [Citation.] The 'prejudice' referred to in . . . section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' " (*Megown, supra*, 28 Cal.App.5th at p. 164, internal quotation marks omitted.) "We review the trial court's exercise of discretion in admitting evidence under section 352 for abuse and will not disturb the court's ruling except on a

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<sup>14</sup> "Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (§ 1109, subd. (a)(1).)

showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” (*Ibid.*, internal quotation marks omitted.)

Under section 1109, “[t]he principal factor affecting the probative value of an uncharged act is its similarity to the charged offense. [Citation.] Section 1109 was intended to make admissible a prior incident similar in character to the charged domestic violence crime, and which was committed against the victim of the charged crime or another similarly situated person.” (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531–532 (*Johnson*), internal quotation marks omitted.) Here, the 2014 incident was very similar to the 2016 incident. Therefore the evidence about the 2014 argument undoubtedly had some probative value, particularly given the legislative judgment expressed by section 1109 that “similar prior offenses are uniquely probative of guilt in a later accusation.” (*Johnson, supra*, at p. 532, internal quotation marks omitted.)

It is also true that “if a witness to the uncharged offense provided a detailed report of that incident without being aware of the circumstances of the charged offense, the risk that the witness’s account may have been influenced by knowledge of the charged offense would be eliminated and the probative value of the evidence would be enhanced.” (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404; see also *Johnson, supra*, 185 Cal.App.4th at p. 533 [noting with respect to section 1109 evidence that “the evidence of the prior assaults came from independent sources, which reduced the danger of fabrication”].) Here, there was no independent source of information about the 2014 incident. While this fact reduces the probative value of the evidence, it does not eliminate it.

Turning to the prejudice inquiry, we disagree with Olmedo that the evidence was unduly prejudicial. Olmedo argues that the undue prejudice stems from Michelle’s testimony that Olmedo “pinned me down, sat on top of me, this time not on my stomach but just on my hips, and held me down, was just screaming at me about that I was disrespectful, didn’t like the way I talked to him, I needed to respect that he’s the man,



stuff like that.” However, the testimony describing Olmedo’s uncharged act “was no stronger and no more inflammatory than the testimony concerning the charged offenses. This circumstance decreased the potential for prejudice.” (*Ewoldt, supra*, 7 Cal.4th at p. 405.)

We reject Olmedo’s contention that the content of Olmedo’s alleged statements in 2014 was more inflammatory than what Michelle testified he said or did to her in 2016. Michelle testified that in the 2016 incident Olmedo said “I control you. You can’t get away from me.” She also testified that, in the 2016 incident, Olmedo hit her, strangled her, and caused her to bleed. Therefore, Michelle’s testimony about the 2014 argument was “less egregious and inflammatory” than the details of the 2016 incident, substantially reducing any risk of undue prejudice. (See *Johnson, supra*, 185 Cal.App.4th at pp. 533–534.)

Furthermore, it is very unlikely that the jury believed Michelle’s testimony about the 2014 incident but did not believe her testimony about the 2016 incident. (See *Ewoldt, supra*, 7 Cal.4th at p. 405.) Indeed, it appears that the jury did not credit the bulk of Michelle’s account of either the 2016 or the 2014 incident, since it acquitted Olmedo of all charges except misdemeanor battery against a former girlfriend.<sup>15</sup> Olmedo did not contest that he and Michelle had had a dating relationship. Therefore, the jury could have convicted Olmedo of battery based only on the testimony of Santiago and on the photographs taken by Officer Wilson, while rejecting many of the details of Michelle’s testimony, including her account of the 2014 incident.

For these reasons, the trial court’s ruling that the probative value of the evidence relating to the 2014 incident outweighed any undue prejudice was not arbitrary,

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<sup>15</sup> The jury was instructed for that crime “the People must prove that: [¶] 1. The defendant willfully touched [Michelle] in a harmful or offensive manner; [¶] AND [¶] 2. The defendant has or previously had an engagement or dating relationship with her.” (CALCRIM No. 841.)

capricious, or patently absurd. We find no error in the trial court's admission of the testimony.

### **III. DISPOSITION**

The judgment is affirmed.

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DANNER, J.

WE CONCUR:

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GREENWOOD, P.J.

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BAMATTRE-MANOUKIAN, J.

*People v. Olmedo*  
**H045840**